

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

OAH No. 2012040395

HAYLIE C.,

Claimant,

vs.

EASTERN LOS ANGELES REGIONAL
CENTER,

Service Agency.

DECISION

Administrative Law Judge Deborah M. Gmeiner of the Office of Administrative Hearings heard this matter on May 14, 2012, in Alhambra, California.

Haylie C. (Claimant) was represented by her mother, Jane W. and her father Homan C.¹ Claimant did not attend the hearing.

Gerard A. Torres (Torres), Supervisor, represented Eastern Los Angeles Regional Center (ELARC or Service Agency).

During the hearing the parties agreed that ELARC would provide information about the date of a FOCUS behavior management and parent consultation report referenced in a Service Agency Interdisciplinary note authored by service coordinator Flor Ortega (Ortega). Mr. Torres emailed the Claimant's parents and the Administrative Law Judge this information on May 14, 2102. The email was printed and the hard copy received into evidence without any objection as Claimant's Exhibit 3. Oral and documentary evidence was received and the matter was submitted for decision on May 14, 2012.

¹ Claimant and her parents are identified by first name and last initial to protect their privacy.

ISSUE

Should ELARC be required to fund 20 hours per month of behavior management services?

FACTUAL FINDINGS

Jurisdictional Facts and Background

1. Claimant is a five-year old girl who lives with her parents. She qualifies for Regional Center services on the basis of mental retardation. Claimant has a multitude of physical problems. She is eligible for special education services through the Temple City School District (District), and attends a special day class at the La Rosa Elementary School.

2. In December 2010, Claimant's parents completed ELARC's Parent Group Behavioral Strategies Workshop. This was done as a component of behavior modification services for Claimant.

3. In June 2011, Claimant was assessed by FOCUS, an agency vendored to provide behavior modification services. The assessment was funded by ELARC. FOCUS provided an assessment report in August 2011. The assessment was conducted over four days in June 2011. Specifically, mother was asking for services to help her properly deal with Claimant's tantrums. The assessment also identified self-stimulatory behavior as another reason for the referral. FOCUS evaluated the need for Applied Behavioral Analysis (ABA) services, parent consultations and an intervention plan for Claimant and her family. Claimant, her mother, her nanny and her teacher participated in the assessment. The assessment reviewed Claimant's functioning over several domains, including cognition, language, self-help and motor skills. The assessment included a summary of Claimant's strengths and weaknesses. According to the assessment Claimant is unable to communicate her desires or dislikes. She occasionally has a difficult time transitioning. This problem is reported with respect to toileting, bathing and when a TV show is ending. Difficulty in transitioning was observed in school and at home. Transitioning problems were characterized by tantrums, crying and whining. Tantrums were occurring between a high of three times per day and a low of one time per day during a two week period in the month of June. Self stimulating behavior such as waiving her hands in front of her eyes and putting her hands to her mouth were also observed. On the positive side, Claimant is described as a friendly child who frequently has a smile on her face. She unhesitatingly engaged with the assessor and liked to play with toys that made a sound.

4. The August 2011 assessment plan prepared by FOCUS specifically addressed Claimant's tantrums and included several goals and corresponding long and short term objectives to reduce tantrums. In addition to reducing the frequency of tantrums, Claimant's goals included functional communication, including the use of pictures or gestures to express Claimant's wants and needs. This was determined to be a functionally equivalent replacement behavior for Claimant's tantrums. Several objectives were designed to improve

Claimant's functional communication, including learning to follow a visual schedule, waiting for a preferred activity, and engaging in non-preferred table-top activity. Several objectives were also established for parents to assist them to replace tantrums with functional communication. Additional skill-building goals were included in the assessment report. The recommended methodology included Applied Behavior Analysis using a verbal behavior approach, natural environment training and parent training. FOCUS recommended 20 hours per month of intervention.

5. A "Request and Consent to Provide Medical/ Psychological/ Behavior Modification Services" dated August 29, 2011 requested funding for 14 hours of behavior modification services to be provided by FOCUS. This form is used to initiate a request to purchase a service (POS request or form). The form was signed by several ELARC staff members within a few days of its completion. It was not signed by the parents. A note on the form indicates that FOCUS was not to develop a communication board without further consultation with a Speech Therapist. The POS request indicates the service is approved for tantrums at home. The form is date stamped October 13, 2011. Services were not started until mid-November 2011 because the service coordinator, Flor Ortega (service coordinator or Ortega) was on leave. There was also a lapse in services between December 7, 2011 and December 23, 2011 because of a personnel change at FOCUS.

6. On December 27, 2011, an Individual Program Plan (IPP) meeting was held. Mother and Claimant's service coordinator participated in the meeting. The IPP document describes Claimant's tantrums. According to the IPP document, Claimant tantrums on a daily basis. Claimant throws herself backwards on the floor, often times hitting her head on the floor. Mother reports that Claimant pulls her own hair out in "chunks." A tantrum can last as little as one to two minutes and as long as 30-40 minutes. According to Mother, when Claimant tantrums she may have to be restrained for her own safety. Mother believes that Claimant tantrums out of frustration. The IPP also describes Claimant engaging in self-stimulating behavior in the car. The IPP also reports that Claimant is not aware of danger and requires constant supervision. A Service Provision Agreement was included with the IPP. The agreement indicates that ELARC would fund 14 hours per month of behavior management. Mother signed the IPP indicating that she met on the date specified and agreed to the outcomes and plans described in the IPP.

7. On February 2, 2012. ELARC received a Behavior Management/Parent Consultation report from FOCUS. The report provided information regarding Claimant's progress during the purchase of service authorization period between October 1, 2011 and January 31, 2012. Data regarding the frequency of tantrums is collected by parents between 6:30 p.m. and 8:30 p.m. According to the data reported by FOCUS, Claimant's tantrums decreased from an average of seven times per week during a two week period in June 2011 to an average of three times per week during the period from December 9, 2011 through the week of January 17, 2012. The report included skill building in the areas of communication and imitation. The communication skill was designed to provide Claimant with a functional means of communication using picture icons, PECS and/or gestures to express words and needs. Imitation skills involved increasing her motor skills to help facilitate her ability to

exchange picture icons and /or to use signs and gestures. Imitation is a foundational skill for more complex skills such as self-help, play and communication. Functional communication is designated as the replacement behavior for tantrums. The FOCUS recommended using natural environment training, pivotal response training and discrete trial training (DTT). FOCUS recommended an increase in services from 14 hours per month to 24 hours per month.

8. On February 2, 2012, Ortega wrote in the Inter-Disciplinary notes (ID notes) maintained by ELARC, that she had received and reviewed FOCUS's report and noted that FOCUS was requesting funding for 24 hours per month of service. On February 7, 2012, Ortega emailed parents regarding documentation necessary to process parents' request for respite. She did not address the FOCUS report in this email. On that same day, Ortega wrote in the ID notes that she contacted Dr. Bienstock, staff psychologist, regarding FOCUS's request for 24 hours per month of behavior modification services. Ortega wrote that Dr. Bienstock authorized 14 hours of behavior modification services.

9. On February 7, 2012, Dr. Bienstock made the following entry in the ID notes:

After reviewing the progress reports from FOCUS with regard to [Claimant], here are my clinical findings and rationale:

- (1) FOCUS was approved for behavior management interventions in November of 2011. We usually approve these interventions at a rate of 12-14 hours per month. However, if there are cases in which additional hours have been approved if behaviors pose a significant threat to safety (sic). The reports from FOCUS do not indicate any significant safety concerns which would warrant additional hours.
- (2) The most recent report from FOCUS dated February 1, 2012 indicates through the visual data (graphs) that a consistent and significant decrease in [Claimant's] tantrums has occurred. Therefore, it is not clear why 20 hours a month would be requested. In fact, the data supports a decrease in hours (fade plan).
- (3) FOCUS also reports that self-stimulatory behaviors were being addressed. However, there is no data or narrative information pertaining to this goal.
- (4) FOCUS also includes goals pertaining to skills (motor, imitation) and that is not consistent with ELARC's definition of behavior management services, which can be found in ELARC's policy handbook. Basically, b-management (sic) is to help teach a family strategies and interventions to decrease maladaptive behaviors and increase more appropriate behaviors. These are specific to the original goals. All other skill building goals should be addressed through other

interventions such as AST.

- (5) Finally, in one respect, FOCUS reports that DTT is being used. However, they have not been approved to provide this services which may account for some of the confusion.

Dr. Bienstock's February 7, 2012 ID note ends with this direction to Ortega:

Please clarify these issues with the vendor so that you can get back to the parent and address her concerns. However, from a clinical perspective it appears that [Claimant] is making excellent progress with regard to tantrums and an increase in hours is not clinically warranted at this time.

Dr. Bienstock's note does not indicate she reviewed Claimant's December 27, 2011 IPP or that she was aware that Claimant sometimes throws herself back so that she hits her head on the floor and pulls "chunks" of hair out when she tantrums..

10. There is no evidence that Ortega contacted FOCUS in response to Dr. Bienstock's request. According to the ID notes, Ortega emailed mother on February 9, 2012 as follows:

The FOCUS Education Program's progress report was reviewed by our clinical team and it was determined that 14 hours of behavior modification remains appropriate. Additional hours are typically approved if behaviors pose a significant threat to safety. However, [Claimant's] progress report does not indicate or address any significant safety concerns that would warrant additional hours. Behaviors support a decrease in hours.

11. In her email to parents, Ortega makes no mention of Dr. Bienstock's concerns regarding how and why FOCUS was addressing self-stimulatory behavior, skill-building, and the use of DTT. Ortega also does not tell mother that she has been asked by Dr. Bienstock to clarify these issues and whether she has complied with Dr. Bienstock's request.

12. Service coordinator submitted a POS request dated January 31, 2012 and 14 hours per month of behavior modification was approved for the period beginning on February 1, 2012 through May 31, 2012.

13. On February 21, 2012, Ortega receiving a message from mother describing a full day of tantrums and hair pulling. Mother described Claimant being upset but unable to communicate what she wanted or needed. Mother asked Ortega to ask the clinicians to reconsider the decision to fund only 14 hours per month of ABA therapy. Mother expressed her concern that Claimant cannot communicate her most basic needs and mother's desire to not miss "this valuable window of opportunity." The same day Ortega entered an ID note indicating that she had "telephone contact" with mother and that she would be sending out a

Notice of Proposed Action. There is no evidence that Ortega requested reconsideration of the clinical decision.

14. An undated Notice of Proposed Action (NPA) was admitted into evidence. The NPA incorrectly states “ELARC proposed to reduce behavior modification services from 20 to 14 hours per month.” In fact, ELARC was denying an increase in services, not reducing the level of services previously approved. The reason for the action is identical to the reason stated in Ortega’s February 9, 2012 email to mother. The legal, regulatory and/or policy authority cited is Welfare and Institutions Code section 4646.5, subdivision (a)(1) in part and of section 4646 (a) in part.²

15. Parents believe that Claimant’s tantrums have decreased because they give her a toy to keep Claimant from escalating and/or to calm her down. Father explained that they have purchased numerous new toys for this purpose. Both mother and father recognize that this approach is only temporary and that they will need to develop better ways to help Claimant control herself. Parents believe that this will require Claimant to acquire some means of communication so that she is able to get her needs met without tantrums. Parents believe that their daughter can be taught some communication skills through ABA. They want the Service Agency to fund additional hours of service so FOCUS can provide this training. FOCUS’ report supports parents’ belief that Claimant can learn some functional communication skills to replace her tantrums. FOCUS proposes to teach these skills using natural environmental training, pivotal response training and discrete trial training.

16. ELARC believes that no additional services are necessary because Claimant’s tantrums have decreased. ELARC disagrees with FOCUS’ recommendation for DTT services. ELARC does not explain why such a program would not be appropriate as a means of teaching Claimant functional communication to replace her maladaptive tantrums. Torres testified that the AST referred to in Dr. Bienstock’s ID note is a form of social skills training. Torres did not think that it was appropriate for Claimant.

17. ELARC contends that behavior modification and DTT are “totally different”, and that vendors may not switch between the two services. ELARC did not adequately explain the distinction between behavior modification and DTT and why DTT is not appropriate as a means of teaching Claimant replacement behaviors. ELARC contends that the distinction is included in the Service Agency’s behavior modification policies and procedures (policies and procedures), but those documents were not offered into evidence. Finally ELARC contends that parents are provided with a copy of those policies and procedures when they take the parent training workshop. ELARC offered no proof that

² All further statutory references are to the Welfare and Institutions Code unless otherwise indicated. In its NPA, Service Agency set forth only a portion of the language of sections 4646 and 4646.5. By citing to the law itself, the Service Agency provided Claimant with adequate notice under section 4701, subdivision (b) and (d). However, its action of setting forth only part of the statute’s wordings can be misleading to those unfamiliar with the law.

Claimant's parents received a copy of such documents. Parents could not recall receiving the policies and procedures

18. ELARC uses an internal clinical team to review requests for behavior modification services. From the ID notes in this case, this team appears to be composed of Dr. Bienstock and the service coordinator. In the ID notes, Dr. Bienstock directed the service coordinator to get more information from FOCUS so that the service coordinator could discuss the clinical team's decision with the parents. Presumably, if that request had been complied with and more information had been obtained about the concerns raised by Dr. Bienstock, the clinical team could have reconsidered its decision as mother requested. There is no evidence that the service coordinator or anyone else ever obtained any additional information from FOCUS. Without that additional information, the decision making process was incomplete. This error was compounded when the service coordinator failed to inform the parents that Dr. Bienstock was asking her to obtain more information from FOCUS. If the service coordinator had communicated Dr. Bienstock's request for more information to parents, parents would have been in a position to participate in the decision making process by requesting the additional information from FOCUS and discussing options with the clinical team. The opportunity to participate in the decision making process was also denied when service coordinator failed to convey mother's request for reconsideration of the clinical teams decision.

LEGAL CONCLUSIONS

1. The Lanterman Developmental Disabilities Services Act (Lanterman Act) governs this case. (§ 4500 et seq.)

2. The standard of proof in this matter is a preponderance of the evidence. The Claimant bears the burden of proof because she seeks additional hours of service. (Evid. Code, §§ 115 and 500.)

The Individual Program Planning Process

3. A service agency is required to secure services and supports that meet the individual needs and preferences of consumers (§§ 4501 and 4646, subd. (a)); support their integration into the mainstream life of the community (§§ 4501 and 4646, subd. (a)); "foster the developmental potential of the person" (§ 4502, subd. (a)); and "maximize opportunities and choices for living, working, learning and recreating in the community" (§ 4640.7, subd. (a).)

4. The consumer's needs are determined through the IPP process. The process "is centered on the individual and the family of the individual with developmental disabilities and takes into account the needs and preferences of the individual and the family, where appropriate, as well as promoting community integration, independent, productive, and normal lives, and stable and healthy environments." In providing services to the consumer, the Service Agency should "be effective in meeting the goals stated in the individual

program plan, reflect the preferences and choices of the consumer, and reflect the cost-effective use of public resources.” (§ 4646, subd. (a).)

5. “For all active cases, individual program plans shall be reviewed and modified by the planning team, through the process described in Section 4646, as necessary, in response to the person's achievement or changing needs, and no less often than once every three years. If the consumer or, where appropriate, the consumer's parents, legal guardian, or conservator requests an individual program plan review, the individual program shall be reviewed within 30 days after the request is submitted.” (§ 4646.5, subd. (b).) ELARC acknowledges that the regional center may also convene an IPP.

6. “The individual program plan is developed through a process of individualized needs determination. The individual with developmental disabilities and, where appropriate, his or her parents, legal guardian or conservator, or authorized representative, shall have the opportunity to actively participate in the development of the plan.” (§ 4646, subd. (b).)

7. “Individual program plans shall be prepared jointly by the planning team. Decisions concerning the consumer’s goals, objectives, and services and supports that will be included in the consumer’s individual program plan and purchased by the Regional Center or obtained from generic agencies shall be made by agreement between the Regional Center representative and the consumer or, where appropriate, the parents, legal guardian, conservator, or authorized representative at the program plan meeting.” (§ 4646, subd. (d).)

8. Although an IPP must reflect the needs and preferences of the consumer (§ 4512, subd. (b)), a regional center is not mandated to provide all the services a consumer may require. A regional center’s provision of services to consumers and their families must “reflect the cost-effective use of public resources.” (§ 4646, subd. (a).) A regional center also has discretion in determining which services it should purchase to best accomplish all or any part of a consumer’s IPP. (§ 4648.) This entails a review of a consumer’s needs, progress and circumstances, as well as consideration of a regional center’s service policies, resources and professional judgment as to how the IPP can best be implemented. (§§ 4646, 4648, 4624, 4630, subd. (b) & 4651; and see, *Williams v. Macomber* (1990) 226 Cal.App.3d 225, 233.)

Behavior Modification Services

9. The Lanterman Act specifically addresses the provision of applied behavior analysis (ABA) and intensive behavior intervention services. Section 4686.2, subdivision (d) defines ABA and intensive behavior intervention as follows:

(1) "Applied behavioral analysis" means the design, implementation, and evaluation of systematic instructional and environmental modifications to promote positive social behaviors and reduce or ameliorate behaviors which interfere with learning and social interaction.

(2) "Intensive behavioral intervention" means any form of applied behavioral analysis that is comprehensive, designed to address all domains of functioning, and provided in multiple settings for no more than 40 hours per week, across all settings, depending on the individual's needs and progress. Interventions can be delivered in a one-to-one ratio or small group format, as appropriate.

Section 4686.2, subdivision (a), provides that:

[A]ny vendor who provides applied behavioral analysis services, or intensive behavioral intervention services or both, as defined in subdivision (d), shall:

(1) Conduct a behavioral assessment of each consumer to whom the vendor provides these services.

(2) Design an intervention plan that shall include the service type, number of hours and parent participation needed to achieve the consumer's goals and objectives, as set forth in the consumer's individual program plan (IPP) or individualized family service plan (IFSP). The intervention plan shall also set forth the frequency at which the consumer's progress shall be evaluated and reported.

(3) Provide a copy of the intervention plan to the regional center for review and consideration by the planning team members.

Section 4686.2, subdivision (b)(5) requires that the regional center "evaluate the vendor's intervention plan and number of service hours for ABA or intensive behavioral intervention no less than every six months, consistent with evidence-based practices. If necessary, the intervention plan's treatment goals and objectives shall be updated and revised."

Section 4686.2 also requires parent participation in the intervention plan, and provides at subdivision (b)(4) that the regional center shall:

. . . [d]iscontinue purchasing ABA or intensive behavioral intervention services for a consumer when the consumer's treatment goals and objectives, as described under subdivision (a), are achieved. ABA or intensive behavioral intervention services shall not be discontinued until the goals and objectives are reviewed and updated as required in paragraph (5) and shall be discontinued only if those updated treatment goals and objectives do not require ABA or intensive behavioral intervention services.

10. Under the Lanterman Act, the IPP is not a static document: it is intended to changes as a consumer changes. Various provision of the Lanterman Act require periodic review of the IPP and its implementation to determine whether the consumer's needs have changed and whether goals and objectives achieved or need to be revised. (See §§ 4646.5, subd. (a)(7); 4640.7; 4686.2, subd. (b)(5).)

11. In light of Factual Findings 1 through 18 and Legal Conclusions 1 through 10, Claimant has met her burden to show that 20 hours of behavior management services are appropriate. ELARC did not meet its burden to demonstrate that 20 hours of service are not warranted.

ORDER

The appeal of Claimant Haylie C. is granted.

Dated: May ___, 2012

DEBORAH M. GMEINER
Administrative Law Judge
Office of Administrative Hearings

NOTICE

Under the Lanterman Developmental Disabilities Services Act, this is a final administrative decision; both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within 90 days.